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THE TREATY-MAKING POWER UNDER THE UNITED STATES CONSTITUTION — THE FEDERAL MIGRATORY BIRDS ACT. — In view of the many current discussions as to the extent of the federal treaty-making power, especially with relation to the League of Nations and the proposed labor clauses of the Versailles treaty, particular interest attaches to the three latest federal decisions concerning the scope of the treaty-making power, all alike upholding the constitutionality of the United States Migratory Birds Act of July 3, 1918.¹

On March 4, 1913, Congress passed the first Migratory Birds Act² to afford national protection to certain wild game birds which, because of their semiannual migrations from state to state, could not be protected by the laws of any state. The act provided that "migratory game and insectivorous birds, which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations" to be made by the United States Department of Agriculture.

The constitutionality of this act was attacked in the case of *United States v. Shawver*,³ decided on May 25, 1914,⁴ upon the ground that the

¹ *United States v. Thompson*, 258 Fed. 257 (1919); *United States v. Samples*, 258 Fed. 479 (1919); *United States v. Selkirk*, 258 Fed. 775 (1919).

² 37 STAT. AT L. 847, c. 145 (COMP. STAT., § 8837).

³ 214 Fed. 154 (1914).

⁴ Motion for rehearing decided on July 9, 1914.

power to make regulations for the protection of wild birds rested with the states and had never been delegated to the federal government. Although it is well settled that primarily the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals *ferae naturae* to possession,⁵ it was argued that the federal government had the power to pass this statute either (1) under the power of the national government, analogous to the state police power, to carry out its constitutional implied powers,⁶ or (2) under the theory that wild migratory birds were the "property of the United States," and that the federal government had therefore the constitutional power to protect them under Art. IV, § 3, cl. 2, or (3) under the power of Congress to regulate interstate commerce upon the theory that migratory birds constitute interstate commerce. The court decided that the act was unconstitutional, as the exercise of a power not delegated to the federal government, and therefore, under the Tenth Amendment, reserved to the states, (1) since there is no implied power given by the Constitution to the federal government to protect migratory birds, (2) since wild animals cannot constitute "property" until reduced to possession, and (3) since migratory birds cannot be said to constitute interstate commerce. The decision of *United States v. Shauver* has been followed by similar decisions in the cases of *United States v. McCullagh*,⁷ *State of Maine v. Sawyer*,⁸ and *State of Kansas v. McCullagh*.⁹

On December 8, 1916, the President proclaimed a treaty, entered into on August 16, 1916, between the United States and Great Britain on behalf of Canada, in order to afford international protection to wild birds migrating back and forth between Canada and the United States.¹⁰ Thereafter Congress passed the Migratory Birds Act of July 3, 1918,¹¹ of substantially the same character as the unconstitutional act of March 4, 1913, except that by its terms it was expressly framed to give effect to the convention. It provided that the Secretary of Agriculture might establish regulations to protect such migratory birds as were mentioned in the treaty, and made it unlawful for any one to take or kill migratory birds in any part of the United States in violation of these regulations. The President promptly promulgated regulations under this statute; and a number of violations having occurred, criminal prosecutions were commenced in several states,¹² and the question thus directly raised as to the constitutionality of the legislation of July 3, 1918. The determina-

⁵ *Patson v. Pennsylvania*, 232 U. S. 138 (1914); *Geer v. Connecticut*, 161 U. S. 519 (1896).

⁶ "It is now equally well settled that the United States does possess what is analogous to the police power, which every sovereign nation possesses, . . . to carry into effect those powers which the Constitution has conferred upon it. (*In re Debs*, 158 U. S. 564, 581; *Light v. United States*, 220 U. S. 523, 536; *Hoke v. United States*, 227 U. S. 308, 323.)" *United States v. Shauver*, 214 Fed. 154, 156 (1914).

⁷ 221 Fed. 288 (1915).

⁸ 113 Me. 458, 94 Atl. 886; L. R. A., 1915 F, 1031 (1915).

⁹ 96 Kan. 786, 153 Pac. 557 (1915).

For a doubt as to the correctness of these decisions, see Note in L. R. A., 1915 F,

1031.

¹⁰ 39 STAT. AT L. 1702.

¹¹ 40 STAT. AT L. 755, c. 128 (COMP. STAT., §§ 8837 a-8837 m.)

¹² See cases cited *supra*, note 1.

tion of this question evidently depends upon the validity of the treaty which the law was passed to enforce; and this in turn involves a consideration of the constitutional treaty-making power of the United States.

The constitutional provisions in respect to the making of treaties are stated in the broadest terms.¹³ Under these provisions no argument is needed to show that treaties duly entered into by the United States are supreme over all state legislation, or even state constitutional provisions. This has never been doubted since it was first laid down in unequivocal terms in the early and much-quoted case of *Ware v. Hylton*.¹⁴

The relation of treaties to federal legislation has also been well settled. The courts have uniformly held that since the Constitution has declared that the laws which shall be made in accordance with its provisions and all treaties shall be "the supreme law of the land," it has placed them upon an equal footing; and that therefore a treaty may abrogate any prior statute,¹⁵ and similarly Congress may repeal or supersede any treaty by a subsequently passed statute.¹⁶ Before the courts will impute to Congress an intention to violate an article of a treaty with a foreign power, however, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction.¹⁷

Granted that a treaty, as the "supreme law of the land," overrides all contrary state statutes or state constitutional provisions and all prior federal statutes, what will be the effect of a treaty whose terms are at variance with the provisions of the United States Constitution? Is the treaty-making power subject to constitutional limitations, or is it, as has sometimes been declared, entirely unlimited?

Although the courts have never directly decided this question, since no treaty in conflict with the Constitution has ever been made,¹⁸ interesting dicta have occurred in a number of cases. In a passage from *Geofroy*

¹³ Article II, Section 2, cl. 2: The President "shall have power, by and with the . . . consent of the Senate, to make treaties: Provided, two-thirds of the Senators present concur."

Article I, Section 10, cl. 1: "No State shall enter into any Treaty, Alliance, or Confederation."

Article VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

¹⁴ 3 Dallas (U. S.), 199 (1796). In that case Mr. Justice Chase said: "A treaty cannot be the supreme law of the land — that is, of all the United States — if any act of a state legislature can stand in its way. If the Constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrated? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole."

¹⁵ *Hijo v. United States*, 194 U. S. 315, 324 (1904); *United States v. Lee Yen Tai*, 185 U. S. 213, 220, 221 (1902); *Whitney v. Robertson*, 124 U. S. 190, 194 (1888).

¹⁶ *The Cherokee Tobacco*, 11 Wall. (U. S.) 616 (1870); *Ward v. Race Horse*, 163 U. S. 504 (1896); 2 BUTLER, TREATY-MAKING POWER, §§ 384-386.

¹⁷ *In re Chin A. On*, 18 Fed. 506 (1883); 2 BUTLER, TREATY-MAKING POWER, § 387.

¹⁸ 2 BUTLER, TREATY-MAKING POWER, § 459.

v. Riggs,¹⁹ which has been quoted with unreserved approval so often that it has come to be regarded almost as settled law, Mr. Justice Field said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541 [5 Sup. Ct. 995, 29 L. Ed. 264]. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."²⁰

What constitutes the precise extent and meaning of the limitations thus suggested is not entirely clear. It seems fairly obvious that it would not be possible through the exercise of the treaty-making power to unseat a state governor or to alter substantially the machinery of state government. Similarly, it would probably be impossible to violate, even through the plenary treaty-making power, those fundamental and express prohibitions of the Constitution such as the Thirteenth and Eighteenth Amendments; there is little doubt but that a treaty provision introducing slavery into the United States would be void, — municipally if not internationally.²¹ As to some of the other constitutional prohibitions which have not been treated as quite so fundamental, the question is open to more doubt. Clearly a treaty could deprive one of his right to jury trial, in a consular court²² or in an "unincorporated territory," such as Porto Rico or the Philippines;²³ it is extremely questionable, however, whether a treaty could deprive a person of this right within one of the states of the United States. The Fifth Amendment prohibits the federal government from depriving any one of his life, liberty, or property without due process of law; whether the United States could by treaty abrogate an individual's vested rights of life, liberty, or property without payment of compensation²⁴ has never been directly settled. It is quite

¹⁹ 133 U. S. 258 (1890).

²⁰ *Geofroy v. Riggs*, 133 U. S. 258, 266 (1890).

²¹ The inquiry has never been pressed home as to whether a treaty which is void under a state's municipal law may be valid and binding from the viewpoint of international law, *i. e.* whether a state whose constitution forbids the effectuating of a treaty duly entered into is liable internationally for its breach. The question would seem to depend upon whether the other parties to the treaty could be charged with notice internationally of the constitutional limitations which limit the state's treaty-making powers. It would seem that foreign states should be charged with notice of such clear and express limitations as the Thirteenth Amendment forbidding slavery; but the matter is open to far more question as to those limitations dependent upon the settled course of judicial interpretation.

²² *In re Ross*, 140 U. S. 453 (1891).

²³ *Cf. Hawaii v. Mankichi*, 190 U. S. 197 (1903).

²⁴ There seems no doubt but that if compensation were paid, individual vested rights may be given away by treaty. Per Chase, J., in *Ware v. Hylton*, 3 Dallas (U. S.)

arguable that the deprivation of such vested rights by a treaty otherwise valid would be a deprivation by due process of law.

It is also open to serious question whether or not the federal government has the power to alienate by treaty territory belonging to one of the states without its consent. Although such an extreme power was denied by Daniel Webster, as secretary of state, yet Chief Justice Marshall and Mr. Justice Story maintained its existence in certain contingencies, and Chancellor Kent squarely affirmed it, declaring in no uncertain terms that "there can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty, . . . whether that territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private."²⁵

The argument has been pressed that if the treaty-making power is subject to constitutional restrictions, if it is restricted as declared in *Geofroy v. Riggs*, *supra*, "by those restraints which are found in that instrument [*i. e.* the Constitution] against the action of the government or of its departments," then among these fundamental limitations is the restriction that the President and the Senate cannot by treaty effect what if done by an act of Congress would be clearly an invasion of the powers reserved to the states and a violation of the Tenth Amendment. If federal legislation and treaties are by the Constitution placed upon an equal footing, then, it is said, the President and the Senate cannot accomplish by treaty what would be unconstitutional if enacted by Congress as federal legislation.²⁶ This argument is so plausible that it has won many adherents; yet that it is indefensible is shown by a varied line of cases whose authority has become so well established that they are not now open to question.

No right could be more exclusively the subject of state control than the ownership of land within the state.²⁷ Congressional legislation undertaking to regulate such a matter would be clearly unconstitutional. A Maryland statute, passed under this unquestioned power of the state, provided that land inherited by French subjects should, after the expiration of ten years from the date of acquisition, pass to the state of Maryland unless the French owner should settle within the state of Maryland or become a citizen thereof. Yet when the United States made a treaty with France in 1800 enabling the people of each country to hold inherited lands in the other country without naturalization or other requirement, even though this conflicted with the existing Maryland statute, the treaty was held valid and binding in the case of *Chirac v. Chirac*,²⁸ and the state legislation therefore void.²⁹ Similarly, the regulation of inheri-

199, 245 (1795). Cf. French Spoliation Claims. Cf. also, *The Schooner Peggy*, 1 Cranch (U. S.), 103 (1801).

²⁵ KENT, COMMENTARIES, *166. For the views of Chief Justice Marshall and Justice Story, see 9 MOORE'S DIGEST OF INTERNATIONAL LAW, 173. See also 2 BUTLER, TREATY-MAKING POWER, 387-394.

²⁶ Thomas Jefferson is said to have once maintained this view. See 2 BUTLER, TREATY-MAKING POWER, § 467.

²⁷ *United States v. Fox*, 94 U. S. 315 (1876).

²⁸ 2 Wheat. (U. S.) 259 (1817).

²⁹ See, to the same effect, *Fairfax v. Hunter*, 7 Cranch (U. S.), 603 (1812); *Craig v.*

tance of realty within a state clearly falls among the powers reserved to the several states in the Tenth Amendment,³⁰ yet the Supreme Court has not hesitated to declare in the case of *Hauenstein v. Lynnharn*³¹ that the federal government may by treaty regulate the right to inherit state lands, even though the effect is to abrogate an otherwise valid state statute. Likewise in *Hopkirk v. Bell*,³² which involved a state statute of limitations, a subject clearly within the exclusive jurisdiction of the states, it was held that the state statute must give way to the conflicting provisions of a national treaty. The right of a state to determine who shall be allowed within its borders to act as executor or administrator is again a power retained exclusively by the states; yet the courts have uniformly held that the federal government may in the exercise of the treaty-making power abrogate or alter such state regulations.³³

The foregoing decisions to the effect that powers ordinarily understood as being reserved to the states may be invaded by the federal government under the treaty-making power are clearly correct. Such "reserved powers" or "states' rights" have been again and again invaded by the federal government acting under other plenary powers. Under the interstate commerce power, the taxing power, the power to declare war and to raise and support armies, the large general powers unquestionably reserved to the states have been invaded by Congress through the enactment of such far-reaching and important legislation as the White Slavery Act,³⁴ the Pure Food and Drugs Act,³⁵ the Webb Kenyon Act,³⁶ the Narcotic Drugs Act,³⁷ the Oleomargarine Act,³⁸ the Espionage Law,³⁹ and countless others. If our courts have established the well-settled principle that the federal government in the exercise of its expressly delegated plenary powers may invade the general reserved powers of the states, it would be strange indeed if the treaty-making power, granted by the Constitution to the federal government in such large and unrestricted terms, formed the single exception.

The truth is that the states clearly do *not* reserve to themselves all pow-

Radford, 3 Wheat. (U. S.) 594 (1818); *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 496 (1824); *Droit d'Aubaine*, 8 Opin. Att'y-Gen'l, 411.

³⁰ *Clarke v. Clarke*, 178 U. S. 186, 190 (1900).

³¹ 100 U. S. 483 (1879).

³² 3 Cranch (U. S.), 453; 4 Cranch (U. S.), 164.

³³ *In re Fattosinis' Estate*, 33 Misc. 18, 67 N. Y. Supp. 1119 (1900); *In re Lobrasiano's Estate*, 38 Misc. 415, 77 N. Y. Supp. 1040 (1902); *In re Wyman*, 191 Mass. 276, 77 N. E. 379 (1906); *Carpigiani v. Hall*, 172 Ala. 287, 55 So. 248 (1911); *In re Scutella's Estate*, 145 App. Div. 156, 129 N. Y. Supp. 20 (1911).

³⁴ Act of June 25, 1910, c. 395, 36 STAT. AT L. 825 (COMP. STAT., §§ 8812-8819). Upheld in *Hoke v. United States*, 227 U. S. 308, 43 L. R. A. (N. S.) 906 (1913).

³⁵ Act of June 30, 1906, c. 3915, 34 STAT. AT L. 768 (COMP. STAT., §§ 8717-8728). Upheld in *Seven Cases v. United States*, 239 U. S. 510, L. R. A. 1916D, 164 (1916). *Weeks v. United States*, 245 U. S. 618 (1918).

³⁶ Act of March 1, 1913, c. 90, 37 STAT. AT L. 699 (COMP. STAT., § 8739). Upheld in *Clarke Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, L. R. A. 1917 B 1218 (1917).

³⁷ Act of December 17, 1914, c. 1, 38 STAT. AT L. 785 (COMP. STAT., § 6287 g). Upheld in *United States v. Doremus*, 249 U. S. 86 (1919).

³⁸ Act of August 2, 1886, c. 840, 24 STAT. AT L. 209, amended by Act of May 9, 1902, c. 784, 32 STAT. AT L. 193. Upheld in *McCray v. United States*, 195 U. S. 27 (1904).

³⁹ Act of June 15, 1917, c. 30, 40 STAT. AT L. 217, amended by Act of May 16, 1918, c. 75, 40 STAT. AT L. 553. Upheld in *Schenck v. United States*, 249 U. S. 47 (1919).

ers except those expressly delegated to the federal government. Those powers which may be *implied* from the express delegations of federal power are likewise surrendered by the states;⁴⁰ and a large amount of power must be implied from the express treaty-making power. Thus it is that even in the case of purely domestic affairs which ordinarily fall within the unquestioned regulatory power of the states, if these once become matters of international concern, they are no longer reserved to the states. The mere fact that they have become of sufficient international concern to other nations to cause the making of a treaty is enough to show that under the Constitution they no longer remain within the sphere of state reserved powers, but fall within the power of the federal government, to regulate by treaty, or by legislation passed in order to carry out such treaty.

Were it true that the United States could not enter into treaties affecting matters understood to be generally reserved to the states, since the states have by the Constitution surrendered to the United States the *entire* treaty-making power, the result would be an intolerable restriction upon the power of a sovereign nation. There would be an entire absence of power to make treaties often vitally necessary; such a crippling of the sovereignty of the national government could never be presumed to have been intended by the framers of the Constitution. "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of the nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries."⁴¹

Whether considered in the light of past decisions, or in the light of building up a practical and serviceable framework of government, therefore, there would seem to be no room to doubt the correctness of the three latest decisions⁴² upon the scope of the treaty-making power in the United States.

STATE REFERENDUM AND FEDERAL AMENDMENTS. — The Eighteenth Amendment¹ — prohibition's signal victory — has come before the highest courts of several states,² and is likely to reach those of others.³

⁴⁰ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819).

⁴¹ *United States v. Thompson*, 258 Fed. 257, 263 (1919).

⁴² Cases cited in note 1, *supra*. All alike uphold the power of the United States to provide by treaty for the protection of migratory birds.

¹ "Article —, Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." 40 STAT. AT L. 1941.

² *Herbring v. Brown*, Att'y-Gen'l, 180 Pac. (Ore.) 328 (1919); *State v. Howell*, 181 Pac. (Wash.) 920 (1919); *Hawke v. Smith*, 100 N. E. (Ohio) 1000 (1919); *In re Opinion of Justices*, 107 Atl. (Me.) 673 (1919).

³ See Theodore A. Bell, "The Referendum Against National Prohibition," at page 5.